Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1993

PETER FISHER and
BALFOUR HOLDING, INC.,

Petitioners,

vs.

WILLIAM P. TRAINOR; BIO-VITA, LTD.; HEMO-INNOVATIONS, LTD.; DIANE M. TRAINOR; LAUREL MOUNTAIN TRUST; WILLIAM P. TRAINOR, as Trustee of LAUREL MOUNTAIN TRUST; CARL W. RAUSCH; BIOPURE CORPORATION; BIOPURE ASSOCIATES LIMITED PARTNERSHIP; and CREDIT FRANÇAIS INTERNATIONAL, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

When a jury rendered an internally consistent special verdict after trial, but the district judge declared a mistrial solely because -- in his own words -- the litigating parties could not "agree as to the implications of the jury's special verdict,"

1. Did the First Circuit properly refuse to review the jury trial issues in the district court's order by writ of mandamus, since its refusal conflicts with the decisions of this Court and of other federal courts of appeals?

2. Did the First Circuit properly exercise its duty of supervising the district court, by refusing to review the trial judge's failure to meet his own duty to apply the law to the facts found by the special verdict?

3. Did the First Circuit's ruling violate the Seventh Amendment, since a new trial would allow those facts already resolved by the jury to be tried all over again solely because the litigating parties did not "agree" on the legal effect of the verdict?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Petitioners Peter Fisher and Balfour Holding, Inc. are the plaintiffs in the lawsuit entitled *Peter Fisher, et al. v. William P. Trainor, et al.*, D. Mass. Civil Action No. 90-11775 (the "Fisher Action"), and were also the petitioners in the underlying mandamus proceeding before the First Circuit. Peter Fisher is an individual, and Balfour Holding, Inc., is a privately held corporation.

Respondent William Trainor is a defendant in the Fisher Action and was the real party in interest before the First Circuit.

A complete list of the other parties to the Fisher Action and the related case *Bio-Vita, Ltd., et al. v. Carl W. Rausch, et al.*, D. Mass. Civil Action No. 90-12688 (the "Bio-Vita Action") -- none of whom was a party to the bifurcated trial or to the mandamus proceeding before the First Circuit -- is as follows:

Bio-Vita, Ltd. -- a privately held Cayman Islands corporation;

Hemo-Innovations,Ltd. -- a privately held Cayman Islands corporation;

Diane M. Trainor -- an individual;

Laurel Mountain Trust -- a private trust;

William P. Trainor, as Trustee of Laurel Mountain Trust -- the lead individual respondent, in his capacity as Trustee;

Carl W. Rausch -- an individual;

Biopure Corporation -- a closely held Massachusetts corporation; and

Biopure Associates Limited Partnership -- a closely held Massachusetts limited partnership.

Finally, a French bank named Credit Français International, S.A. has moved to intervene in the Bio-Vita Action, which motion is pending before the district court.

Credit Français was not a party to either the trial or the appellate mandamus proceeding.

Apart from respondent William Trainor, the other respondents are named solely to comply with Supreme Court Rule 19.6. Petitioners do not know whether these other respondents will claim an interest in the outcome of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Peter Fisher and Balfour Holding, Inc. (collectively, "Fisher") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit denying Fisher's petition for a writ of mandate entered in this Matter on October 12, 1993, and also the First Circuit's order denying Fisher's petition for rehearing entered in this matter on November 3, 1993.

OPINIONS BELOW

The district court's order and memorandum relating to the underlying mistrial are attached respectively as Appendices "A" and "B"; the First Circuit's judgment and opinion denying Fisher's petition for writ of mandamus are attached respectively as Appendices "C" and "D"; and

the First Circuit's order denying Fisher's petition for rehearing is attached as Appendix "E". None of these rulings is reported.

JURISDICTION

The Court of Appeals for the First Circuit entered its judgment in this case on October 12, 1993, denying a writ of mandate directed to the United States District Court for the District of Massachusetts, and entered its order denying Fisher's petition for rehearing on November 3, 1993. The First Circuit's jurisdiction was based on 28 U.S.C. §1651. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
U.S. Const., 7th Am.

STATEMENT

Introduction

This petition ultimately arises out of Judge Joseph Tauro's order declaring a mistrial on a jury's special verdict which was not faulty in any way. Nobody has ever objected to the jury's conduct or to the process by which its verdict was reached, nor has anyone claimed the verdict contains any legal error or deficiency. In fact, Judge Tauro declared in open court that the jury verdict established "what the truth is with respect to the issues involved in this case." App. "F" at p. 22a (emphasis added).

Yet Judge Tauro set aside the verdict *sua sponte*, solely because the parties did not "agree as to the implications of the jury's special verdict." App. "B" at p. 7a (emphasis added). (Judge Tauro apparently wanted to use the trial verdict in a settlement (*see id.* at p. 8a), and he may have set aside the verdict to punish Fisher for declining to settle the case on terms suggested by Judge Tauro. *See id.*) 1/

But whatever Judge Tauro's reasons for setting aside a valid jury verdict, his order violates Fisher's constitutional right to a jury trial, by vacating a jury verdict just because the litigating parties did not "agree" on its legal meaning. The First Circuit's refusal to review Judge Tauro's order by writ of mandamus not only conflicts with decisions of this Court and other federal courts of appeal, but also calls into play this Court's supervisory powers to enforce "the responsibility of Federal Courts of Appeals to grant mandamus when necessary to protect the constitutional right to trial by jury." *Dairy Queen v. Wood*, 369 U.S. 469, 472 (1962).

Most of the facts necessary to an understanding of the issues presented by this petition are summarized in Judge Tauro's memorandum opinion, which is attached as Appendix "B." The matter below involves two related cases, *Peter Fisher, et al. v. William P. Trainor, et al.*, D. Mass. Civil Action No. 90-11775 (the "Fisher Action") -- from which this petition is taken -- and *Bio-Vita, Ltd., et*

1/ A similar attempt to use jury proceedings for settlement purposes was recently vacated by writ of mandamus by the Sixth Circuit. *In re NLO, Inc.*, 5 F.3d 154, 157-58 (6th Cir. 1993). As the Sixth Circuit explained, "judges should encourage and aid early settlement, however, they should not attempt to coerce that settlement." *Id.* at 157 (granting writ of mandamus to vacate summary jury trial order).

al. v. Carl W. Rausch, et al., D. Mass. Civil Action No. 90-12688 (the "Bio-Vita Action"). The two cases arise out of essentially the same facts. 2/

The Underlying Litigation

As Judge Tauro's memorandum explains, both underlying "cases involve a multi-party business venture aimed at developing a potentially lucrative human blood substitute":

> "[T]he history of the parties' dealings can be briefly summarized as follows. Biopure Corporation ('Biopure') manufactures Hemopure, a purified bovine hemoglobin solution that may lead to the development of a medically safe substitute for human blood used in transfusions. In the latter part of the 1980s, William P. Trainor ('Trainor') and Peter Fisher ('Fisher') discussed the possibility of entering into a joint venture agreement whereby they would provide financial assistance to Biopure in exchange for certain rights in Hemopure and other Biopure products. Although Fisher believed that a joint venture agreement had, in fact, been entered into, he was not included in a series of January 1990 agreements (the '1990 Agreements') between Biopure and Bio-Vita, Ltd. ('Bio-Vita'), a corporation controlled by Trainor. Claiming that

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2/ The Court should note that although Judge Tauro's memorandum refers only to Peter Fisher "[f]or the sake of simplicity, . . . omitting references to the . . . entities aligned with [him]" (App. "B" at p. 4a, n.1), petitioners Mr. Fisher and Balfour Holding, Inc. were both beneficiaries of the jury's special verdict. *See* App. "F" at p. 21a (trial transcript).

Fisher also notes that he disagrees with some of the factual statements in Judge Tauro's memorandum, but does not believe those issues are relevant to this petition.

he had been wrongfully cut out of the deal, Fisher initiated an action (the 'Fisher Action') against Trainor and Biopure.

> "Despite having invested more than one million dollars in the Biopure project, Trainor soon found himself, like Fisher, on the outside of the Biopure project looking in. Alleging that Trainor had made misrepresentations and failed to meet certain obligations, Biopure rescinded the 1990 Agreements with Bio-Vita and, instead, secured the participation of a third party. Trainor commenced his own action (the 'Bio-Vita Action') against Biopure."

App. "B" at pp. 4a-5a (emphases added and footnote omitted). *Accord*, App. "D" at p. 11a.

The Trial and Jury Verdict

After more than two years of pretrial discovery and litigation, "[o]n November 2, 1992, the Fisher Action was called for trial." App. "B" at p. 6a. Judge Tauro "severed the first count of Fisher's amended Complaint for immediate trial." *Id.* As Judge Tauro's memorandum says, Fisher's first "count alleges the existence of, and Trainor's breach of, a binding joint venture agreement." *Id.* at n.3.

After twelve days of trial, and upon the stipulation of the parties, special interrogatories were put to the jury:

> "Pursuant to Fed.R.Civ.P. 49(a), [Judge Tauro] submitted the following questions to the jury at the close of all the evidence:
>
> > "1. Did [Fisher] and [Trainor] enter into a binding oral contract providing that they would share 50/50 in the expenses and gains involved in the Biopure project?

> "If your answer to question one is 'No' you need go no further. If your answer to question one is 'Yes' go on to question[s] two and three.
>
> "2. Did [Fisher] breach the terms of [his] oral contract with [Trainor] by unjustifiably failing to contribute its agreed upon share of the purchase price and other expenses incurred with respect to the Biopure project?
>
> "3. Did [Trainor] breach the terms of his oral contract with [Fisher] by unjustifiably denying [Fisher] an opportunity to participate on a 50/50 basis in the Biopure project?
>
> "On November 24, 1992, the thirteenth day of trial, the jury returned with affirmative answers to questions one and three, and a negative answer to question two."

Id. at pp. 6a-7a. "Given these answers, the jury did not need to address question four, which asked: 'If both [Fisher] and [Trainor] breached the terms of the oral contract, which party breached it first?' " Id. at p. 7a, n.4. (The November 24, 1992 trial transcript is attached as Appendix "F.")

In other words, the jury reached an internally consistent verdict, and Fisher won on all the issues, since the jury found that there was a binding contract; that Fisher did not breach that contract; and that Trainor had breached the contract.

Judge Tauro noted on the record, "The trial now does establish, factually, that there is, or was and is a joint venture with reciprocal obligations between Fisher and Trainor." App. "F" at p. 28a (transcript). In fact, Judge

Tauro complimented the jury because they, "by [their] verdict in this case, have told us what the truth is with respect to the issues that were involved in this case." *Id.* at p. 22a. Trainor's counsel polled the jurors, and they stated they were unanimous. *See id.* Judge Tauro "then recessed the jurors with the purpose of bringing them back later to resolve the remaining issues." App. "B" at p. 7a. *Accord*, App. "D" at pp. 12a-13a.

The Declaration of a Mistrial

Judge Tauro never did "bring [the jury] back later to resolve the remaining issues." App. "B" at p. 7a. Instead, on July 12, 1993 -- over seven months later -- he declared a mistrial *sua sponte*, which he did not say was based on anything wrong with the trial or the verdict.

Instead, Judge Tauro declared the mistrial for the sole reason that the parties "could not . . . agree as to the implications of the jury's special verdict":

> "Just as Fisher and Trainor could not agree as to the effect of their original discussions regarding the joint venture, neither can they now agree as to the implications of the jury's special verdict. Trainor believes that Fisher's right to any relief -- i.e., a share of the judgment, if any, against Biopure -- should be conditioned upon his payment of those expenses he would have been obligated to cover had he not been excluded as a joint venturer from the Biopure project. Fisher argues that he is excused from not putting up his share of the expenses, in light of Trainor's breach of the joint venture agreement. Fisher contends that the trial of the remaining counts in the Fisher Action, including the damages phase of the first count, should await the conclusion of trial in the Bio-Vita Action [*i.e.*, the related action]. Trainor has

> expressed a willingness to proceed with the Bio-Vita Action, but not without the financial support of Fisher. Moreover, the parties disagree as to who should be controlling counsel with respect to the remaining counts.
>
> "Notwithstanding the multiplicity of counts in Fisher's amended complaint, the court believed that a jury verdict as to the first count would essentially resolve the Fisher Action, and allow Fisher and Trainor (or Trainor alone) to proceed against Biopure in the Bio-Vita Action. As has been pointed out above, however, the parties' attitudes toward each other make that impossible.
>
> "Given these extraordinary circumstances, [Judge Tauro] decided not to hold either party to the other's interpretation of the verdict, or to [his] own. Accordingly, [Judge Tauro] s[aw] no practical alternative but to declare a mistrial. In doing so, [he] f[ou]nd that justice will best be served by retracing what, in the context of this litigation, has been a relatively small step."

App. "B" at pp. 7a-8a (emphases added). At the same time, Judge Tauro recused himself from this case (*id.* at p. 8a), although he denied that he was biased or prejudiced as alleged by Fisher's earlier disqualification motion. *See id.* at p. 5a. *Accord*, App. "D" at p. 13a.

The Appellate Mandamus Proceedings

Fisher immediately petitioned for a writ of mandamus to the First Circuit, because "the seventh amendment right to a jury trial is a fundamental right that is generally protectable through mandamus." *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.*, 920 F.2d 1127, 1133 (3d Cir. 1990). Fisher's petition alleged that the

mistrial violated Fisher's constitutional right to a jury trial, because it is undisputed the verdict was not faulty in any way.

Fisher also argued that since Judge Tauro refused to apply the law to a valid jury verdict as required by the seventh amendment, "mandamus lies to a subordinate court to compel that court . . . to proceed in the due exercise of its discretion where it has refused to proceed." *In re Smith & Wesson*, 757 F.2d 431, 435 (1st Cir. 1985) (granting writ of mandamus). *See* App. "D" at pp. 15a-16a.

On October 12, 1993, the First Circuit denied Fisher's petition. Its opinion specifically "d[id] not address the merits of [Fisher's] contentions." App. "D" at p. 16a. Instead, the First Circuit denied the petition because supposedly "petitioners still have an adequate remedy through a direct appeal after final judgment." *Id.* The First Circuit also noted that supposedly "[i]n a civil case, the remedy for a wrongfully declared mistrial is a second trial." *Id.* Fisher timely petitioned for rehearing, but the First Circuit denied the rehearing petition on November 3, 1993. App. "E" at p. 18a.

Fisher now brings this certiorari petition, because although a thirteen-day jury trial may be "a relatively small step" timewise in the context of a lawsuit (App. "B" at p. 8a), "the invariable usage settled by the decisions of ages [is that] the facts once tried by a jury are <u>never</u> re-examined, unless a new trial is granted . . . <u>for good cause shown</u>." *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-78 (1913) (emphases added). *Accord*, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991) (a district court "can only grant a new trial . . . under the standards permitted by federal law").

"Good cause" for granting a new trial cannot exist simply because the parties cannot agree on the verdict's meaning, because it is the judge's duty to give legal meaning to the verdict. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir.), *cert. denied*, 490 U.S. 1051 (1989) ("the Seventh Amendment command[s] that judgment be entered on the verdict if the jury's answers are clear and consistent").

REASONS FOR GRANTING THE WRIT

Since the constitutional debates, the right of trial by jury has been hailed as "a valuable safeguard to liberty" and "the very palladium of free government." *The Federalist* No. 83, at p. 614 (Alexander Hamilton) (John C. Hamilton, ed., 1904). As this Court has explained, "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Chauffeurs v. Terry*, 494 U.S. 558, 565 (1990). *Accord*, *Parsons v. Bedford*, 28 U.S. 433, 447 (1830) ("The trial by jury is . . . a fundamental guarantee of the rights and liberties of the people.").

By refusing to grant mandamus review of the mistrial order, when that order was based solely on the fact the litigating parties did not "agree" on the legal effect of the jury's verdict, the First Circuit has raised three important legal issues, each one of which independently warrants resolution by certiorari:

First, the court of appeals denied mandamus not on the merits, but instead because supposedly "petitioners still have an adequate remedy through a direct appeal after final judgment." App. "D" at p. 16a. This ruling is in flat-out conflict with decisions by this Court and other circuits which emphasize "the responsibility of Federal Courts of Appeals to grant mandamus when necessary to protect the

constitutional right to trial by jury." *E.g., Dairy Queen, supra*, 369 U.S. at 472. See below at pp. 13-14. Review by certiorari is appropriate to resolve this split of authority. *See* Supreme Court Rules 17.1(a), (c).

Second, by denying mandamus, the First Circuit failed to exercise its supervisory power over Judge Tauro to meet "the trial judge['s] responsibility of applying appropriate legal principles to the facts found by the jury." 5A *Moore's Federal Practice* ¶49.02, at p. 49-9 (2d ed. 1993). *Accord*, Fed.R.Civ.P. 58(2) ("upon a special verdict . . . , the court shall promptly approve the form of the judgment"); 6A *Moore's Federal Practice* ¶58.04[3], at p. 58-42 (2d ed. 1984) ("By returning a special verdict, the jury has found the facts and it then becomes the duty of the court to apply the law to those facts") (emphasis added).

And as this Court has explained, "the traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been . . . to compel [a lower court] to exercise its authority when it is its duty to do so." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). See below at pp. 15-20. Certiorari is appropriate to enforce this duty of appellate supervision. *See* Supreme Court Rule 17.1(a).

And third, to the extent the First Circuit interpreted this Court's precedent to deny mandamus, certiorari is crucial to resolve the resultant split of authority on the propriety of interlocutory appellate review. The First Circuit interpreted this Court's decision in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), essentially as prohibiting review of a mistrial by mandamus. App. "D" at p. 16a. Fisher believes that the First Circuit wrongly interpreted *Daiflon*, since that case recognizes there may be circumstances warranting

mandamus [3/] -- and in fact, post-*Daiflon* decisions continue to follow this Court's holding in *Dairy Queen* that mandamus is warranted to protect a party's constitutional right to a jury trial. *E.g., Tushner v. United States District Court*, 829 F.2d 853, 855 (9th Cir. 1987) (opinion written by then-judge Anthony Kennedy). See below at pp. 20-23. However, since the First Circuit analyzed *Daiflon* as prohibiting mandamus review, its interpretation directly conflicts with *Dairy Queen* and that decisions's post-*Daiflon* progeny such as *Tushner*, and so calls for certiorari review to settle this important question of federal law. *See* Supreme Court Rule 17.1(c).

Each of these issues is ripe for review by certiorari at this time. Indeed, since the basic issues relate to the propriety of interlocutory appellate review, it would actually be counterproductive to wait until the end of the litigation to review these issues. Moreover, since Judge Tauro declared a mistrial without any legal basis, to allow a new trial to go forward without interlocutory review would result in the very type of re-examination of facts already tried by a jury which is specifically prohibited by the Seventh Amendment. This constitutional guarantee would be "effectively lost if a case is erroneously permitted to go to trial." *See Mitchell v. Forsyth*, 477 U.S. 511, 526 (1985). See below at pp. 19, 22.

For these reasons, the Court should grant certiorari to review these important questions, which have tremendous significance not only for the parties to this action, but also to the whole concept of trial by jury. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (right to trial by jury may not be "indirect[ly] impair[ed]

3/ *See* 449 U.S. at 36 ("our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What, never? Well, hardly ever!' ") (emphasis in original).

through possible enlargement of the power of re-examination").

QUESTION NO. 1:
Certiorari Should Issue to Review the First Circuit's Refusal to Review the Jury Trial Issues By Writ of Mandamus, Since Such Refusal is in Conflict With Reported Decisions of This Court and Other Federal Courts of Appeals

Review by writ of certiorari is proper "[w]hen . . . a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court" (Supreme Court Rule 17.1(c)), or "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Supreme Court Rule 17.1(a). Both conditions are met here, since the First Circuit's opinion conflicts not only with this Court's prior decisions, but also with published opinions of the Second, Third, Ninth, and Tenth Circuits. Certiorari is necessary to resolve this conflict.

As noted above, the First Circuit "d[id] not address the merits of [Fisher's] contentions," but instead denied mandamus only because supposedly "petitioners still have an adequate remedy through a direct appeal after final judgment." App. "D" at p. 16a. This ruling directly conflicts with this Court's and four other circuits' decisions emphasizing "the responsibility of Federal Courts of Appeals to grant mandamus when necessary to protect the constitutional right to trial by jury." *Dairy Queen, supra*, 369 U.S. at 472 (granting writ of mandamus that jury issues be tried first in bifurcated trial). *Accord, Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (same); *Goldman, Sachs & Co. v. Edelstein*, 494 F.2d 76, 78 (2d Cir. 1974) (same); *Allegheny, supra*, 920 F.2d at 1133 (3d Cir.) (same); *Tushner, supra*, 829 F.2d at 855 (9th Cir.) (same); *In re Kaiser Steel Corp.*, 911 F.2d 380, 388 (10th Cir. 1990)(same). *See also Ex Parte Quirin*, 317 U.S. 1, 19-

20 (1942) (granting certiorari to stay military trial of accused Nazi saboteur, pending review whether jury trial was necessary).

As the Second Circuit explained in *Goldman, Sachs,* these Supreme Court decisions have "implied that it is our duty to grant mandamus in aid of that right":

> "[T]he Supreme Court in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), removed any doubt regarding the propriety of mandamus to protect a litigant's right to a jury trial of issues . . . . Indeed, in its later decision in Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), the Court implied that it is our duty to grant mandamus in aid of that right, stating (at p. 472, 82 S.Ct. at p. 897): 'Our decision [in Beacon] reversing that case . . . emphasizes the responsibility of the Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury . . . .'"

Goldman, Sachs, supra, 494 F.2d at 78 (granting writ). *Accord, Tushner, supra,* 829 F.2d at 855 (same); Allegheny, supra, 920 F.2d at 1134 ("the seventh amendment entitlement to a jury trial is a fundamental right that is generally protectable through mandamus").

Because the First Circuit's denial of mandamus directly conflicts with these cases, certiorari is necessary to resolve this split of authority between different courts.

QUESTION NO. 2:
Certiorari Should Be Granted to Enforce Appellate Powers of Supervision, Since the First Circuit Should Have Directed the Trial Court to Meet Its Duty to Apply the Law to the Facts Found By the Jury

Certiorari should issue "[w]hen a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). By vacating the jury's verdict simply because the parties did not agree on its legal effect, Judge Tauro abdicated his duties as a judge.

The First Circuit's failure to grant mandamus on these facts, ignores "the traditional use of the writ . . . to compel [a lower court] to exercise its authority when it is its duty to do so." *Will, supra*, 437 U.S. at 661. *Accord, Mallard v. United States District Court*, 490 U.S. 296, 308 (1989); Annotation, Mandamus as Appropriate Remedy to Control Action of Federal Court in Civil Case, 57 L.Ed.2d 1203, 1209 (1979) ("the writ of mandamus . . . affords an expeditious and effective means of compelling a lower court to exercise its authority").

"By returning a special verdict the jury has found the facts and it then becomes the duty of the court to apply the law to those facts . . . ." *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir.), *cert. denied*, 490 U.S. 1051 (1989) (emphasis added); 6A *Moore's Federal Practice* ¶58.04[3], at p. 58-42 (2d ed. 1984) (same). *See also Snydam v. Williamson*, 61 U.S. 427, 432 (1857) ("it is of the very essence of a special verdict that the jury should find the facts on which the court is to pronounce the judgment according to law"). A judge cannot shirk this duty merely because the litigating parties do not "agree as to the

implications of the jury's special verdict." App. "B" at p. 5 (emphasis added).

Instead, a judge may "grant a new trial . . . only under the standards permitted by federal law." *Mattison, supra*, 947 F.2d at 108. And "[t]he Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." *Robles, supra*, 862 F.2d at 1204 (emphasis added). *Accord, Slocum, supra*, 228 U.S. at 377 ("the facts once tried by a jury are never re-examined, unless a new trial is granted . . . for good cause shown") (emphases added). "Good cause" exists when "the jury have misinterpreted the instructions as to the rules of law, or misapplied them, [or] when it appears that there was no real evidence in support of any essential fact." *Id.* at 379. None of these circumstances showing "good cause" exists here.[4/]

4/ Indeed, nobody has challenged the jury verdict on any ground; instead, the parties merely disagree (as litigating parties often do) about its legal effect. App. "B" at p. 7a. This is no valid ground for throwing out the verdict, since "the Seventh Amendment command[s] that judgment be entered on the verdict if the jury's answers are clear and consistent, subject, of course, to the usual motions under rules 50 and 59 for judgment notwithstanding the verdict or a new trial." App. "D" at p. 15a, quoting *Robles, supra*, 862 F.2d at 1204 (emphasis added). Those rules "permit the court to interfere with a verdict, under Rule 50, only where no substantial evidence is offered on which the jury can base its award, and, under Rule 59, only where the verdict is 'against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice.' " *Mattison, supra*, 947 F.2d at 107 (emphases added) (mistrial may be granted "only under the standards permitted by federal

(footnote continued on next page)

There is no inconsistency in the jury's special verdict, since it found there was a binding contract which Trainor had breached, and which Fisher did not breach. App. "B" at p. 7a. Upon these findings, Judge Tauro could have had the jury determine the damages resulting from Trainor's breach of contract; or he could have set a trial in the related Bio-Vita Action, allowing Fisher to enforce his constructive trust claim over any proceeds which Trainor might recover in that action; or he could have entered judgment or done something else. But what Judge Tauro could not do was declare a mistrial and throw out the jury's special verdict. In doing so, he violated his "duty . . . to apply the law." *Robles, supra*, 862 F.2d at 1204. *Accord*, 5A *Moore's Federal Practice* ¶49.02, at p. 49-9 (2d ed. 1993) ("the trial judge [has] the responsibility of applying appropriate legal principles to the facts found by the jury").

(footnote continued from previous page)

law").

None of these grounds exists here, or was even identified by Judge Tauro in his order declaring a mistrial. Instead, he set aside the verdict solely because the parties could not "agree" on its legal effect, thereby violating his own duty as the judge to determine that legal effect. "[M]andamus review [is] not only appropriate but compelling, [where] the district court found that the jury was properly instructed [and] the evidence supported the verdict as a whole, [but t]he sole ground for ordering a [new] trial was . . . a discrete question of law and fact." *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212-13 (8th Cir. 1982) (emphasis added) (granting mandamus to set aside new trial which "would resolve nothing which has not already been resolved"). *See also Holmes v. United States*, 541 F.2d 1243, 1249 (7th Cir. 1976) ("In cases charging a violation of constitutional rights, mandamus should be construed liberally"; granting writ under 28 U.S.C. §1361).

Nor are disagreements between parties the "extraordinary circumstances" referenced by Judge Tauro's memorandum (App. "B" at p. 8a), and Fisher suggests that it is actually quite common for litigating parties to disagree. If the parties could agree, they would not be in court in the first place, and a judge's duty is to apply the law to the facts found by the jury to resolve those disagreements.

Moreover, Judge Tauro did not simply fail in his duty to apply the law, but he also set aside a jury verdict which was untainted by any legal or procedural error. In so doing, he usurped the jury's powers because "[n]o fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." U.S. Const., 7th Am. (emphasis added). In other words, the Seventh Amendment "expresses in clear terms the principle that facts once found by a jury in the context of a civil trial are not to be reweighed and a new trial granted lightly . . . . Therefore, to safeguard the constitutional right to a jury trial, the granting of a new trial which sets aside a jury verdict must undergo careful appellate scrutiny." *Narcisse v. Illinois Central Gulf R.R.*, 620 F.2d 544, 546 (5th Cir. 1980).

This rule applies with special force to this case because Judge Tauro's constitutional violation cannot be over-emphasized. As the First Circuit noted in its opinion, a judge may set aside a jury verdict in a civil case "only if it is quite clear that the jury has reached a seriously erroneous result." App. "D" at p. 16a. And a verdict is "seriously erroneous" only where there is "some error of law which interfered in the proceedings." *See Parsons, supra*, 28 U.S. at 447. There was no such "error of law" tainting the jury verdict, and "[n]o authority from any time has been found that the court can substitute its judgment for that of the jury on a matter properly committed to it." *Mattison, supra*, 947 F.2d at 108-09

(emphasis added). *Accord*, Fed.R.Civ.P. 38(a) ("the right of trial by jury . . . shall be preserved to the parties inviolate").

The Seventh Amendment's prohibition on re-examination of facts already tried by a jury means that such facts cannot be re-examined, not that such a re-examination should merely be overturned on appeal. It is in effect an immunity from re-examination, and this Court has repeatedly held that the analogous immunity of federal officials from being sued warrants interlocutory appellate review in order to prevent the occurrence of a trial even through it could be appealed after the fact. *E.g.*, *Mitchell, supra*, 472 U.S. at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.") (emphasis added).

Allowing the re-examination of facts determined by the jury's special verdict in this case would thus violate the Seventh Amendment and could not be remedied merely by reversing on appeal, since the Seventh Amendment's guarantee against re-examination of facts "is effectively lost if a case is erroneously permitted to go to trial." *See id. See also NLO, supra*, 5 F.3d at 159 (granting mandamus to vacate order to proceed to summary jury trial; "A direct appeal of the order to participate in a summary jury trial will never be possible; a final decision on the merits would necessarily take place after such a proceeding had already occurred.").

The bottom line is whether a trial court can declare a mistrial when nobody has pointed to any error or irregularity in the trial or verdict. Despite extensive research on the subject, Fisher's counsel has not located any case involving a mistrial which was not based on some irregularity or problem in the process by which the verdict was reached. But the most logical answer is that "the

jury's work product must tell the tale," as the First Circuit held in another case, rejecting a mistrial demand based on the speed of a jury's deliberation:

> "If the answers to special questions, and the verdict itself, are consistent with the weight of the evidence, and no other red flags are flying, the rapidity or languor with which the jury acts is an irrelevance."

Veranda Beach Club v. Western Surety Co., 936 F.2d 1364, 1383 (1st Cir. 1991).

Similarly, since the special verdict answers are consistent and "no other red flags are flying," Judge Tauro should not have disregarded the jury's verdict and declared a mistrial. Instead, it was "the duty of the court to apply the law to those facts" (*Robles, supra*, 862 F.2d at 1204), and it was the First Circuit's duty to grant mandamus "to compel [the district court] to exercise its authority when it is its duty to do so." *Will, supra*, 437 U.S. at 661. Certiorari should thus issue so this Court can exercise its supervisory powers. Supreme Court Rule 17.1(a).

QUESTION NO. 3:

Certiorari Should Issue to Resolve Important Questions on the Propriety of Interlocutory Appellate Review, Since the First Circuit's Interpretation of *Daiflon* Contradicts This Court's *Dairy Queen* Case and Its Post-*Daiflon* Progeny

Certiorari is warranted when "a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court." Supreme Court Rule 17.1(c). The First Circuit's opinion interprets this Courts Daiflon decision in such a way as to practically preclude mandamus review of mistrial orders, by holding in this matter that mandamus should not be

granted -- regardless of the merits -- because supposedly "petitioners still have an adequate remedy through a direct appeal after final judgment." App. "D" at p. 16a. Indeed, the First circuit goes so far as to note that supposedly "[i]n a civil case, the remedy for a wrongfully declared mistrial is a second trial." *Id.*

The First Circuit's interpretation directly conflicts with this Court's *Dairy Queen* opinion, which emphasizes "the responsibility of Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." 369 U.S. at 472. And the Second, Third, Ninth, and Tenth Circuits have all granted writs of mandamus to protect jury rights even where an appeal could ultimately have been taken. *Goldman, Sachs, supra*, 494 F.2d at 78; *Allegheny, supra*, 20 F.2d at 1133; *Tushner, supra*, 829 F.2d at 855; *Kaiser Steel, supra*, 911 F.2d at 388. To allow this conflict to exist will create parallel but conflicting lines of cases on the propriety of interlocutory appellate relief, and so the Court should grant certiorari to resolve this important question of federal law.

Although the First Circuit claimed that supposedly Fisher would not suffer irreparable injury by waiting to appeal after the new trial (App. "D" at p. 16a), *Dairy Queen* and its progeny involved no more "irreparable injury" than does this matter, since the improper order of trial could have been overturned on appeal in every single one of those cases. But mandamus was still appropriate -- even though in each case there could have been a direct appeal after final judgment -- because of "the responsibility of Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." *Dairy Queen, supra*, 369 U.S. at 472; *Allegheny, supra*, 920 F.2d at 1133.

This responsibility applies with special force here, because -- in Judge Tauro's own words -- the members of the jury "by [their] verdict in this case, have told us what the truth is with respect to the issues that were involved in this case." App. "F" at p. 22a (trial transcript). Yet Judge Tauro declared a mistrial simply because the parties "could not . . . agree as to the implications of the jury's special verdict." App. "B" at p. 7a. Thus, Judge Tauro set aside a jury verdict that is not faulty in any way.

The First Circuit's refusal to address this injustice -- because supposedly "[i]n a civil case, the remedy for a wrongfully declared mistrial is a second trial" (App. "D" at p. 16a) -- is itself a violation of the Seventh Amendment's prohibition on the re-examination of facts already resolved by a jury. This constitutional right "is effectively lost if a case is erroneously permitted to go to trial." *See Mitchell, supra,* 477 U.S. at 526. "A direct appeal of the order to participate in a [new] jury trial will never be possible; a final decision on the merits would necessarily take place after such a proceeding had already occurred." *See NLO, supra,* 5 F.3d at 159.

To allow the mistrial order to stand "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will." *Narcisse, supra,* 620 F.2d at 546-47. This is because the Seventh "Amendment not only preserves th[e jury trial] right but discloses a studied purpose to protect it from indirect impairment through possible enlargement of the power of re-examination existing under the common law, and to that end declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.' " *Baltimore & Carolina Line, supra,* 295 U.S. at 657.

Fisher submits that certiorari should issue on this matter, so this Court can make clear that for a "trial judge

to disregard a jury's verdict at will," is a violation of the Seventh Amendment which warrants mandamus review. The remedy is not a "second trial" as suggested by the First Circuit, but instead an enforcement of the Seventh Amendment's prohibition on the re-examination of facts already tried by a jury other than according to the rules of the common law.

CONCLUSION

For each of the above independent reasons, the petition for a writ of certiorari should be granted.

January 1994. Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER FISHER, et al.,	*	
Plaintiffs,	*	
v.	*	CA No. 90-11775-T
WILLIAM P. TRAINOR, et al.,	*	
Defendants.	*	
	*	
BIO-VITA, LTD., et al.,	*	
Plaintiffs,	*	
v.	*	CA No. 90-12688-T
CARL W. RAUSCH, et al.,	*	
Defendants,	*	
Plaintiffs-in-	*	
Counterclaim,	*	DOCKETED
v.	*	
WILLIAM P. TRAINOR, et al.,	*	
Defendants-in-	*	
Counterclaim	*	
and Third-Party	*	
Defendants.	*	

ORDER

July 12, 1993

Tauro, Ch.J.

For the reasons stated in the accompanying memorandum, the court hereby declares a mistrial in Civil Action No. 90-11775-T (the "Fisher Action"). The present jury is hereby discharged. Both the Fisher Action

and Civil Action No. 90-12688-T (the "Bio-Vita Action") shall be tried before a new jury. Both actions will be transferred to another judge.

It is so ordered.

/s/ Joseph L. Tauro
United States District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER FISHER, et al., Plaintiffs,	*	
v.	*	CA No. 90-11775-T
WILLIAM P. TRAINOR, et al., Defendants.	*	
BIO-VITA, LTD., et al., Plaintiffs,	*	DOCKETED
v.	*	CA No. 90-12688-T
CARL W. RAUSCH, et al., Defendants, Plaintiffs-in-Counterclaim,	*	
v.	*	
WILLIAM P. TRAINOR, et al., Defendants-in-Counterclaim and Third-Party Defendants.	*	

MEMORANDUM

July 12, 1993

Tauro, Ch.J.

The above captioned cases involve a multi-party business venture aimed at developing a potentially lucrative human blood substitute.

I.

At the expense of some detail,[1/] the history of the parties' dealings can be briefly summarized as follows. Biopure Corporation ("Biopure") manufactures Hemopure, a purified bovine hemoglobin solution that may lead to the development of a medically safe substitute for human blood used in transfusions.[2] In the latter part of the 1980s, William P. Trainor ("Trainor") and Peter Fisher ("Fisher") discussed the possibility of entering into a joint venture agreement whereby they would provide financial assistance to Biopure in exchange for certain rights in hemopure and other Biopure products. Although Fisher believed that a joint venture agreement had, in fact, been entered into, he was not included in a series of January 1990 agreements (the "1990 Agreements") between Biopure and Bio-Vita, Ltd. ("Bio-Vita"), a corporation controlled by Trainor. Claiming that he had been wrongfully cut out of the deal, Fisher initiated an action (the "Fisher Action") against Trainor and Biopure.

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1. For the sake of simplicity, the court will refer only to the principal parties involved in these cases, omitting references to the individuals and entities aligned with each of them.

2. Although a breakthrough once seemed imminent for Biopure, see Lawrence K. Altman, U.S. Approves Test of Blood Substitute From Cattle, N.Y. Times, Feb. 25, 1991, at B8, Hemopure's promise has since been diminished in the wake of unsuccessful clinical trials, see Testing of Blood Substitute Is Halted, Boston Globe, June 18, 1991, at 20; see also Robert Metz, Firms Hit Roadblocks in Trying to Make Blood Substitute, Boston Globe, Jan. 19, 1993, at 36.

Despite having invested more than one million dollars in the Biopure project, Trainor soon found himself, like Fisher, on the outside of the Biopure project looking in. Alleging that Trainor had made misrepresentations and had failed to meet certain obligations, Biopure rescinded the 1990 Agreements with Bio-Vita and, instead, secured the participation of a third party. Trainor commenced his own action (the "Bio-Vita Action") against Biopure.

The Fisher and Bio-Vita Actions have moved forward together, albeit slowly. In August of 1991, with the consent of all parties, I referred both actions to a special master, David Berman, to supervise discovery. Thanks in large part to Mr. Berman's valuable assistance, the parties appeared ready to proceed to trial in October of 1992.

On Thursday, October 22, 1992, the parties were before me for a hearing on certain motions in limine. During the course of that hearing, the issue of settlement was raised. Although the parties were unable to resolve their differences, they agreed to report back to the court on the progress of their discussions. Following a further settlement conference on Monday, October 26, it became apparent that a universal settlement involving all parties was not attainable.

On October 28, 1992, another conference was held to address various pretrial matters, including the motions in limine partially addressed at the October 22 hearing. After I ruled on those and other motions, James B. Hicks, on of Fisher's attorneys, requested that I recuse myself from presiding in the Fisher and Bio-Vita Actions. I denied that motion in open court, finding it "totally without merit."

Fisher v. Trainor, Nos. 90-11775-T, 90-12688-T, slip. op. at 13 (D. Mass. Jan. 7, 1993).

On November 2, 1992, the Fisher Action was called for trial. Motivated by the goal of securing "the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, I severed the first count of Fisher's amended complaint for immediate trial.[3] Pursuant to Fed. R. Civ. P. 49(a), I submitted the following questions to the jury at the close of all the evidence:

> 1. Did [Fisher] and [Trainor] enter into a binding oral contract providing that they would share 50/50 in the expenses and gains involved in the Biopure project?
>
> If your answer to question one is "No" you need go no further. If your answer to question one is "Yes" go on to question[s] two and three.
>
> 2. Did [Fisher] breach the terms of [his] oral contract with [Trainor] by unjustifiably failing to contribute its agreed upon share of the purchase price and other expenses incurred with respect to the Biopure project?
>
> 3. Did [Trainor] breach the terms of his oral contract with [Fisher] by unjustifiably

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3. That count alleges the existence of, and Trainor's breach of, a binding joint venture agreement. Respectively, Fisher's second, third and fourth counts allege misrepresentations, interference with contract or advantageous relationships, and breach of fiduciary duty by Trainor. Most of the remaining counts in Fisher's amended complaint are brought against Biopure.

> denying [Fisher] an opportunity to participate on a 50/50 basis in the Biopure project?

On November 24, 1992, the thirteenth day of trial, the jury returned with affirmative answers to questions one and three, and a negative answer to question two.[4] I then recessed the jurors with the purpose of bringing them back later to resolve the remaining issues.

III.

Just as Fisher and Trainor could not agree as to the effect of their original discussions regarding the joint venture, neither can they now agree as to the implications of the jury's special verdict. Trainor believes that Fisher's right to any relief--i.e., a share of the judgment, if any, against Biopure--should be conditioned upon his payment of those expenses he would have been obligated to cover had he not been excluded as a joint venturer from the Biopure project. Fisher argues that he is excused from not putting up his share of the expenses, in light of Trainor's breach of the joint venture agreement. Fisher contends that the trial of the remaining counts in the Fisher Action, including the damages phase of the first count, should await the conclusion of trial in the Bio-Vita Action. Trainor has expressed a willingness to proceed with the Bio-Vita Action, but not without the financial support of Fisher. Moreover, the parties disagree as to who should be controlling counsel with respect to the remaining counts.

---

4. Given these answers, the jury did not need to address question four, which asked: "If both [Fisher] and [Trainor] breached the terms of the oral contract, which party breached it first?"

Notwithstanding the multiplicity of counts in Fisher's amended complaint, the court believed that a jury verdict as to the first count would essentially resolve the Fisher Action, and allow Fisher and Trainor (or Trainor alone) to proceed against Biopure in the Bio-Vita Action. As has been pointed out above, however, the parties' attitudes toward each other make that impossible.

Given these extraordinary circumstances, I have decided not to hold either party to the other's interpretation of the verdict, or to my own. Accordingly, I see no practical alternative but to declare a mistrial. In doing so, I find that justice will best be served by retracing what, in the context of this litigation, has been a relatively small step.

IV.

CONCLUSION

For all of the foregoing reasons, the court declares a mistrial in the Fisher Action and orders that both the Fisher and Bio-Vita Actions be tried before a new jury. Both cases will be transferred to another judge.

An order will issue.

/s/ Joseph L. Tauro
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1914

IN RE:

PETER FISHER & BALFOUR HOLDING, INC.,
Petitioners.

JUDGMENT

Entered October 12, 1993

This cause came on to be submitted on the Petition for Writ of Mandamus to set aside an order of the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for writ of mandamus is denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

(Messrs. Slavitt, Hicks, Best, Mermell, Merberg & Misses Jorrie & McChesney)

APPENDIX " D"

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 93-1914

IN RE:

PETER FISHER & BALFOUR HOLDING, INC.,

Petitioner.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Joseph L. Tauro, U.S. District Judge]

Before
Breyer, Chief Judge,
Torruella and Selya, Circuit Judges

Evan Slavitt, Hinckley, Allen & Snyder, James B. Hicks, Kathy A. Jorrie and Andrews & Kurth L.L.P., on Petitons for Writ of Mandamus, for petitioners.

OCTOBER 12, 1993

Per Curiam. Petitioners Peter Fisher and Balfour Holding, Inc. [hereinafter collectively "Fisher"] seek a writ of mandamus directed to the United States District Court for the District of Massachusetts. This petition arises out of the district court's order declaring a mistrial after the parties to the action could not agree on the implications of the jury's answer to questions submitted to them pursuant to Fed.R.Civ.P. 49(a). The court found that in the circumstances of the case, "justice w[ould] best be served by retracing what, in the context of this litigation, ha[d] been a relatively small step."

Background

The matter below has its source in two actions, both of which relate to a multi-party venture aimed at developing a human blood substitute. We summarize the facts briefly. Biopure Corporation manufactures Hemopure, a potential human blood substitute. In the late 1980s, William Trainor and Peter Fisher discussed entering into a joint venture agreement to provide financial assistance to Biopure in exchange for certain rights in Hemopure and other Biopure products. Fisher believed that an agreement had been entered into. However, in 1990, Biopure and a corporation controlled by Trainor, Bio-Vita, Ltd., entered into an agreement which did not include Fisher. Believing himself wrongfully excluded from the deal, Fisher brought an action against Biopure and Trainor [the "Fisher Action"]. After Trainor had invested over one million dollars in the Biopure project, Biopure rescinded the 1990 agreements on the grounds that Trainor had made misrepresentations and failed to meet certain obligations. Trainor then commenced his own action against Biopure [the "Bio-Vita Action"].

After more than two years of pretrial discovery and litigation, the Fisher Action was called to trial in November 1992. The court severed the first count of Fisher's amended complaint for immediate trial. This count alleged the existence, and Trainor's breach, of a binding joint venture agreement. The amended complaint also included counts of misrepresentation, interference with contract or advantageous relationship, and breach of fiduciary duty against Trainor, and several counts against Biopure.

At the conclusion of the trial, and upon stipulation by the parties, the following questions were submitted to the jury pursuant to Fed.R.Civ.P. 49(a):

> 1. Did [Fisher] and [Trainor] enter into a binding oral contract providing that they would share 50/50 in the expense and gains involved in the biopure project?
>
> If your answer to question one is "No" you need go no further. If your answer to question one is "Yes" go on to question[s] two and three.
>
> 2. Did [Fisher] breach the terms of [the] oral contract with [Trainor] by unjustifiably failing to contribute [his] agreed upon share of the purchase price and other expenses incurred with respect to the Biopure project?
>
> 3. Did [Trainor] breach the terms of his oral contract with [Fisher] by unjustifiably denying [Fisher] an opportunity to participate on a 50/50 basis in the Biopure project?

The jury answered "yes" to questions one and three, and "no" to question two.[1] The court then recessed the jury with the intention of bringing them back later to resolve the issue of damages.

The jury was never called back. Instead on July 12, 1993, the court declared a mistrial sua sponte. It based its decision on the fact that the parties "could not . . . agree to the implications of the jury's special verdict"[2] and how to proceed against Biopure in the Bio-Vita Action. "Given these extraordinary circumstances, [the court] decided not to hold either party to the other's interpretation of the verdict, or to [its] own."

Petitioners contend that in failing to enter a verdict, pursuant to Fed.R.Civ.P. 58(2), in accord with the jury's

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1. Given these responses the jury was not required to address a fourth question which asked, if both Fisher and Trainor had breached the contract, who breached it first.

2. According to the court's memorandum:
Trainor believes that Fisher's right to any relief--i.e., a share in the judgment, if any, against Biopure--should be conditioned upon his payment of those expenses he would have been obligated to cover had he not been excluded as a joint venturer from the Biopure project. Fisher argues that he is excused from not putting up his share of the expenses, in light of Trainor's breach of the joint venture agreement. Fisher contends that the trial of the remaining counts in the Fisher Action, including the damages phase of the first count, should await the conclusion of the trial in the Bio-Vital Action. Trainor has expressed a willingness to proceed with the Bio-Vita Action, but not without the financial support of Trainor [sic]. Moreover, the parties disagree as to who should be controlling counsel with respect to the remaining counts.

special verdict, the court deprived them of their Seventh Amendment right to have judgment entered on the findings of the jury. They petition this court to issue a writ to the district court to enter judgment on the special verdict.

Uses of Mandamus

The All Writs Act, 28 U.S.C. § 1651(a), empowers federal courts to issue writs of mandamus where "necessary or appropriate in aid of their respective jurisdictions." See In Re Pearson, 990 F.2d 653, 656 (1st Cir. 1993). Traditionally such writs have been used "to confine inferior courts to the lawful exercise of their prescribed jurisdiction or compel them to exercise their authority when duty demands." Id.; see also Mallard v. United States Dist. Court for Southern Dist., 490 U.S. 296, 308 (1989) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)). Being drastic measures, such writs "must be used sparing and only in extraordinary situations." Pearson, 990 F.2d at 653 (citing cases). Otherwise they may undermine the policies surrounding the congressional judgment that in general appellate review should be postponed until after final judgment. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). The decision on whether to issue the writ is within the sound discretion of this court. Kerr v. United States District Court for Northern Dist., 426 U.S. 394, 403 (1976).

To ensure that the writ issue only in extraordinary circumstances, a petitioner is required to show "some special risk of irreparable harm" and a "clear entitlement to the

relief requested" before a writ will be issued.[3] In Re Recticel Foam Corp., 859 F.2d 1000, 1005 (1st Cir. 1988); Pearson, 90 F.2d at 656. To satisfy the first requirement, a petitioner "must ordinarily demonstrate that something about the order, or its circumstances which would make an end-of-case appeal ineffectual or leave legitimate interests unduly at risk." Id. (quoting Recticel, 859 F.2d at 1005-06). To satisfy the second, petitioner must "establish a 'clear and indisputable' right to the requested relief or, in other words, that the challenged order is palpably erroneous." Id. (quoting Banker Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (quoting United States v. Duell, 172 U.S. 576, 582 (1899))).

Discussion

Petitioners assert that the court's failure to enter judgment in accord with the verdict in their favor deprived them of their rights under the Seventh Amendment. See Robles v. Exxon Corp., 862 F.2d 1201, 1204 (5th Cir.), cert. denied, 490 U.S. [sic] (1989) ("Rule 58(2) and the seventh amendment command that judgment be entered on the verdict if the jury's answers are clear and consistent, subject, of course, to the usual motion under rules 50 and 59 for judgment notwithstanding the verdict or a new trial"); Toucet v. Maritime Overseas Corp., 991 F.2d 5, 8 (1st Cir. 1993) ("[w]hen a special verdict form results in apparently conflicting findings, a court has a duty under the Seventh

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3. Cases of great public import where advisory mandamus is appropriate are excepted from these requirements. See In Re Recticel Foam Corp., 859 F.2d 1000, 1005 n.4 (1st Cir. 1988). This is not such a case.

Amendment to harmonize the answers if at all possible under a fair reading"). Furthermore, they assert that the court's declaration of a mistrial because the parties could not agree on the meaning of the verdict was a clear abuse of discretion. See Freeman v. Package Machinery Co., 865 F.2d 1331, 1333 (1st Cir. 1988) (judge may set aside jury verdict in civil case "only if, 'it is quite clear that the jury has reached a seriously erroneous result.' ") (quoting Borras v. Sea-Land Services, Inc., 586 F.2d 881, 887 (1st Cir. 1978)). We do not address the merits of these contentions.

As we have said above, to obtain mandamus relief a petitioner must show both a special risk of irreparable harm and a clear entitlement to the relief he seeks. The Supreme Court has indicated that "[a] trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus" because it is likely to meet neither of these standards. Daiflon, 449 U.S. at 36. First, since a litigant may seek review on direct appeal after final judgment, it cannot be said that the litigant is without other adequate means of relief. Id. Second, in a matter committed to the discretion of the trial court, it is unlikely that a litigant can demonstrate that his right to a particular result is clear and indisputable. Id.

Even if this were a rare instance where a discretionary order by a trial court was a palpable abuse of direction, petitioners still have an adequate remedy through a direct appeal after final judgment. See Navarro de Cosme v. Hospital Pavia, 922 F.2d 926, 929 (1st Cir. 1991) ("[i]n a civil case, the remedy for a wrongfully declared mistrial is a second trial"). An erroneous declaration of a mistrial--if the declaration were in fact erroneous -- is not an extraordinary

circumstance. Hence, it does not merit the extraordinary remedy of mandamus relief. Nor does the fact that an appeal after final judgment will require more burdensome litigation, standing alone, justify our use of the power of mandamus. In Re. Pearson, 990 F.2d at 661.

Petitioners' request for a writ of mandamus is denied.

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1914

IN RE:
PETER FISHER & BALFOUR HOLDING, INC.,
Petitioners.

Before
Breyer, Chief Judge,
Torruella and Selya, Circuit Judges

ORDER OF COURT

Entered November 3, 1993

The petition for rehearing on petition for writ of mandamus is denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By: Daniel F. Loughry
Chief Deputy Clerk

(Messrs. Best, Merberg, Mermell, Slavitt & Ms. McChesney)

APPENDIX "F"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER FISHER, et al., Plaintiffs,	:	
vs.	:	CIVIL ACTION
	:	No. 90-11775-T
WILLIAM P. TRAINOR, et al., Defendants.	:	

13TH DAY OF JURY TRIAL

BEFORE: THE HON. JOSEPH L. TAURO,
CHIEF JUDGE, U.S. DISTRICT COURT
DISTRICT OF MASSACHUSETTS

APPEARANCES:

Kathie A. Jorrie, Esq., and Jamese [sic] B. Hicks, Esq.,
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Coral Gables, Florida 33146,
Attorney for the Defendants.

Courtroom No. 2
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
November 24, 1992

Barbara Sakurai, Official Court Reporter
1221 Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
(617) 426-0055
Method of Reporting: Stenotype

PROCEEDINGS

THE COURT: I understand we have a verdict.

THE CLERK: Yes, Your Honor.

THE COURT: All right. Bring the jury down, please.

(Whereupon the jury entered the courtroom at 1:15 p.m.)

THE COURT: Madam Forelady, has the jury reached a unanimous position?

THE FORELADY: Yes, we have.

THE COURT: May I have it, please?

(Verdict handed to the Court.)

THE COURT: Thank you.

THE CLERK: Madam Forelady, please listen to your verdict, as the Court records it.

In answer to Special Interrogatory Question No. 1: Did Mr. Fisher and/or Balfour Holding, Inc., hereinafter called the "Fisher-Balfour Group," and Mr. Trainor enter into a binding oral contract providing that they would share 50/50 in the expenses and gainsinvolved in the Biopure project?

Answer: Yes.

Question No. 2: Did the Fisher-Balfour Group breach the terms of its oral contract with Mr. Trainor by unjustifiably failing to contribute itsagreed upon share of the purchase price and other expenses incurred with respect to the Biopure project?

Answer: Yes.

Excuse me. Answer: No.

Question No. 3: Did Mr. Trainor breach the terms of his oral contract with the Fisher-Balfour Group by unjustifiably denying the Fisher-Balfour Group an opportunity to participate on a 50/50 basis in the Biopure project?

Answer: Yes.

So say you, Madam Forelady?

THE FORELADY: Yes.

THE CLERK: And so say you all, members of the jury?

(Jury indicated yes.)

THE COURT: Do you want to have the jury polled?

MR. MERBERG: Please, your Honor.

THE COURT: When your name is called, please indicate whether you agree with the verdict as it was just recorded.

(Jury polled.)

THE COURT: I want to thank you, members of the jury, very, very much for your valuable public service that you have rendered in this case.

We who have the responsibility for administering justice here in the court system could not function if it were not for men and women like yourselves, who are willing to come and participate in the trial process and sit back and listen objectively to the evidence, and then call it as you see it.

You, by your verdict in this case, have told us what the truth is with respect to the issues that were involved in this case.

You need not answer to anybody because of your verdict or for your verdict. In other words, you need not discuss your verdict with anyone.

On the other hand, you are free to do so, if you would like. This is America. You can talk to anybody you want to. I do want you to know, however, that you don't have to answer to anybody for your verdict.

Now, I don't think I want to discuss this jury as jurors without talking to counsel.

We have ordered lunch for you. If you would like to have one more meal on Uncle Sam, you are more than welcome to do it.

Would you do me a favor and indulge me for a minute? I want to speak to counsel before I decide what I am going to do with you, if anything.

All right. All rise for the jury.

Please go back up. I will have you back down in about three minutes.

(Whereupon the jury left the courtroom.)

THE COURT: I am trying to figure out where we are to head now, whether it is a damages trial or if what the jury verdict means is that Mr. Fisher has one-half of whatever Mr. Trainor has as they go forward.

If that is the situation, then it seems to me, and I am just thinking out loud, but it seems to me that we don't need a damages trial, as such.

It could be that you go back to the mode that you were in before we started this case, and that is that the second case was just about settled -- the overall case was just about settled -- and that these two are partners.

I mean, that is one thing that comes to my mind, in terms of the consequences of this verdict. I have not thought it through to the extent that you people may have, but it seems to me that that is the factual premise upon which we would proceed, based on this jury's verdict.

I don't know whether you have given it any thought or not.

MS. JORRIE: Your Honor, we have given it some thought, but before I respond I would like to speak with my client.

MR. MERBERG: I am sorry. I can't hear you.

MS. JORRIE: Before I respond as to which of the two we'd like to go with, I do need to speak with Mr. Fisher.

THE COURT: Yes. It seems to me that the damages aspect of it, I don't know how you quantify --

MS. JORRIE: Your Honor --

THE COURT: Let me just finish speaking.

I don't see how you can, and there may be a way, but I don't see how you can quantify your damages in this with this jury. Maybe we can.

If we can, we will. However, it seems to me that what is more at stake is the entrepreneurial opportunity, as I see it. Whether that is worth eight billion or a pack of bubble gum, I don't know. That, I think, is what you want to decide.

I don't mean to imply that you have to decide it at this minute. It could be that I can let this jury go, with the understanding that they are not yet dismissed, and that I will notify them officially as to what further action, if any, would be before them. That way you don't have to decide something like this in two minutes out in the corridor.

Would you prefer I do that?

MS. JORRIE: Yes, your Honor.

THE COURT: All right. It seems to me that makes sense.

Bring them back down.

MR. MERBERG: I am sorry. There may be one other question.

THE COURT: Yes.

MR. MERBERG: Because of this jury's verdict, that means, as I understand it, Mr. Fisher now owes half of all the monies that were expended by Mr. Trainor on behalf of what the jury has said is a joint venture. So there may be some requirement that we have an established accounting and payment of Mr. Fisher before the next part of the case goes on.

THE COURT: Yes.

MR. MERBERG: I wonder if this jury is the one to do it, or if we will have agreement as to how much was spent; and, if it was 50/50, as the answer was read, that means Mr. Fisher has an obligation to now pay whatever half of it is.

THE COURT: That could be. Those are all things I would like to have counsel discuss.

As a matter of fact, we have Ms. McChesney here, and you can all chat for a couple of minutes.

I think it makes sense, if you are going to have them, that I reserve this jury.

MR. MERBERG: That is fine, your Honor.

THE COURT: Whether we use them or not, it is something we can determine in the future.

Bring the jury down.

(Whereupon the jury entered the courtroom.)

THE COURT: Thank you for your indulgence, folks.

I am not sure what I am going to be doing with you as a group. So I am going to change one of my comments to you, and I am going to instruct you not to discuss your verdict with anybody.

The reason I am changing is I don't know whether there will be another phase of this case that I will ask you to participate in. So I am going to excuse you now until further notice, but not discharge you as jurors.

So, you are still jurors in the case. When I determine what the appropriate course of action is, I will notify you. That may be to discharge you from any further responsibility, or it may be to bring you back in and have you hear some more evidence and answer another question.

I just don't know the answer to that, but I am confident that, if I do bring you back, that you are going to

approach the future with the same sense of civil responsibility that you have demonstrated thus far; and, if I don't bring you back, don't think that I think you did a lousy job. It is just because we have been able to resolve those problems ourselves.

I don't expect we will be calling you before Thanksgiving.

At the very, very least, let me wish you a very happy holiday. Put this out of your minds. We will be in touch with you as soon as we possibly can.

(Whereupon the jury left the courtroom.)

THE COURT: I just want to say that I thought the quality of the trial work in this case was excellent, and I am directing that at Ms. Jorrie and to Mr. Merberg.

I think each of you have conducted a very, very spirited trial, very, very well prepared, and very, very well presented, and I am pointedly limiting my comments to Ms. Jorrie and Mr. Merberg.

Now, sit down and tell me what you think we should do. I think probably what we should do is to give all you lawyers an opportunity to go back and see where you are, in terms of a possible solution.

As I recall the situation, we were within an inch of a settlement, and, because of the Fisher differences with respect to payment, or the payment schedule -- I can't recall what it was -- we had this trial.

The trial now does establish, factually, that there is, or was and is a joint venture with reciprocal obligations between Fisher and Trainor. Now, this can be very interesting, and we could have a trial a month for the next year; or, my suggestion would be, to now put in place the settlement -- and I don't recall all the details of it -- but the settlement that was worked out, substituting Mr. Fisher as a party to that, an equal party, as opposed to $5,000,000 -- whatever the number is -- and with an appropriate accounting between them, in terms of what monies were supposed to have been paid back and forth.

Now, that is what I see as a simple solution to your present situation. You worked very, very hard to get to the point where the case was almost settled. I don't see how anything has changed particularly with respect to the rest of the case. As I recall it, the only objection to the settlement from Fisher at that time was the manner of payment, how much he was going to get out of it, as opposed to anybody else. Now he established there is a joint venture, and it seems to me you ought to be able to settle the case, and you all go on to become rich and happy.

That is what I think, but I will leave that up to you.

When would you like to report back?

MR. MERBERG: Monday, your Honor.

THE COURT: Well, give yourself time.

I will not be using this courtroom this afternoon. If everybody is going to be here, maybe you could get a bite to eat and use the courtroom as a conference room, or go some place else, if you like.

Are you going to work with them?

MS. McCHESNEY: I am available.

THE COURT: There is nobody else, is there?

MS. McCHESNEY: No.

THE COURT: I think we have everybody. Is there anybody else?

MS. McCHESNEY: No one who is necessary to be here.

THE COURT: All right. Then you work at it, and you let me know, say, but -- Well, I will be around here, if you want me. You can just ask for me and I will come down.

Otherwise, let me know by Monday or let Chickie know how it looks.

In other words, if you want another week and then want to come in for a conference or whatever, just let her know.

(Whereupon the jury was adjourned.)

******

CERTIFICATE

I, Barbara Sakurai, Official Court Reporter, United States District Court, District of Massachusetts, do hereby certify that the foregoing is a true and accurate trancript of the proceedings taken down by me in machine shorthand in the aforementioned matter to the best of my skill and ability, and that the proceedings were transcribed under my direction.

/s/ Barbara Sakurai
Barbara Sakurai

CERTIFICATE OF SERVICE

I certify that on Monday, January 10, 1994, I served three copies of the PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT on all parties required to be served, by depositing such copies in the United States mail, postage prepaid, in envelopes addressed to each of the following:

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